

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LAWANDA BRONSON, Personal
Representative of the Estate
of BRYSON ALLAN BRONSON, for
the benefit of MAURICE BRONSON,
ALEXIS BRONSON, and CHEYENNE
BRONSON, surviving children of
the deceased,

05-CV-1657-SU

OPINION AND ORDER

Plaintiff,

v.

RICHARD DEAN BURKE, an individual,
and JARED MEHARRY, an individual,

Defendants.

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BROWN, Judge.

This matter comes before the Court on Defendant Richard Dean Burke's Motion to Enforce Settlement Agreement (#33). The Court heard argument on the Motion via telephone conference call on October 27, 2006.

For the reasons that follow, the Court **GRANTS** the Motion and directs Plaintiff and her counsel to consummate the Settlement Agreement reached during a settlement conference with this Court on August 25, 2006.

BACKGROUND

The facts are familiar to the parties, and, therefore, the Court need not detail them here except to note the following:

1. On August 25, 2006, at the United States Courthouse in

Pendleton, Oregon, the Court conducted a settlement conference with the parties to this action and other persons involved in or otherwise making claims because of the two-vehicle, double-fatality, multi-injury, motor-vehicle collision that occurred on July 4, 2005, on the Umatilla Indian Reservation. All persons participating were represented by counsel at the conference, and all available insurance proceeds were made available for purposes of the conference.

2. The Court worked with the participants throughout the morning in party-to-party negotiations. An issue in the negotiations was whether Defendant Richard Dean Burke had any personal assets that could be contributed to the insurance settlement funds that had been accumulated. Although Defendant Burke previously owned a fractional interest in some form of Tribal property, he evidently had conveyed such interest to others after the accident and before the settlement conference. Plaintiff Estate of Bryson Allan Bronson contended such conveyance was fraudulent and argued it could be set aside to satisfy any future excess judgment. Thus, Plaintiff continued to seek some contribution from Defendant Burke in addition to insurance proceeds.

3. Defendant Burke, on the other hand, contended his former interests in Tribal property were legitimately transferred and, in any event, were Tribal assets beyond the scope of any

civil judgment resulting from the accident.

4. Ultimately Defendant Burke and Plaintiff reached an agreement that Burke would pay Plaintiff up to an additional \$10,000 if the Tribal Prosecutor dismissed pending DUII charges against Burke, and, as a result, Burke would not be required to expend these same funds to defend himself.

5. When counsel informed the Court that their clients had agreed to this conditional promise whereby Defendant Burke would pay Plaintiff up to \$10,000 in additional funds, the Court noted that Oregon law did not permit plea bargaining for the dismissal of DUII charges in state court and that none of the parties could control the Tribal Prosecutor's exercise of any such discretion even if such negotiation was permitted in Tribal Court. Nonetheless, none of the participants nor their attorneys requested a delay of the conclusion of the settlement conference in order to confer personally with the Tribal Prosecutor about this issue or otherwise to determine for themselves the legal feasibility of a possible dismissal.

6. The settlement conference concluded on the afternoon of August 25, 2006, when all of the participants agreed to mutually acceptable terms that would result in dismissal of this action with prejudice and the mutual release of all claims arising from the collision. The terms of the Settlement Agreement were placed on the record. The Settlement Agreement included both the

unconditional promise by the participating insurers to pay certain sums to resolve all claims against their insureds and the conditional promise by Defendant Richard Dean Burke to pay an additional \$10,000 to the Estate of Bryson Allan Bronson. The Settlement Agreement also provided the Court would retain jurisdiction over the settlement to bring an orderly conclusion to these matters.

7. In particular, the parties agreed to the conditional promise by Defendant Burke to pay Plaintiff an additional \$10,000 as follows:

In addition to the insurance company payments, Mr. Burke agrees to pay an additional \$10,000 to the Bronson Estate conditioned upon dismissal of the [DUII criminal] charges filed against Mr. Burke by the Umatilla Tribe Tribal prosecutor.

The beneficiaries of the Bronson Estate will cooperate in seeking the dismissal of those charges [against] Mr. Burke.

If the charges are not dismissed, there will be no exchange of money from Mr. Burke to the Bronson Estate. However, the release of all claims will remain in full force, full effect and force.

8. When the Settlement Agreement was summarized for the record, the Court noted the Tribal Prosecutor's exercise of discretion was independent of the settlement proceedings and, therefore, something neither the parties nor the Court could control:

With respect to the issue of the pending charge against Mr. Burke in Tribal Court, this Court, of course, can take no position regarding that private understanding.

[The Court] note[s] that if the prosecution had been initiated under state law, there would not be any legal basis to negotiate the dismissal of a charged DUI.

But apparently that rule does not extend to the Tribal Courts. And so whatever exercise of sovereignty the Tribal prosecutor chooses to make is a decision independent of this proceeding.

Although the Court stated on the record that the rule against such negotiation "apparently" did not apply to Tribal Court, the Court was referring to the earlier off-the-record discussions with the parties in which the Court had raised the state-law prohibition.

9. Sometime after the August 25, 2006, settlement conference, Plaintiff's counsel approached the Tribal Prosecutor. Based on the Prosecutor's reaction, Plaintiff's counsel concluded a dismissal of the DUUI charge was never a viable possibility, and, therefore, the conditional promise by Defendant Burke to pay an additional \$10,000 was illusory. Accordingly, Plaintiff and her counsel have refused to conclude the settlement on the basis that there was a material mistake of fact precluding a binding settlement agreement.

DISCUSSION

"It is well settled that a district court has the equitable power to enforce summarily an agreement to settle a case pending before it." *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987). An agreement to settle a federal case is a contract governed by

applicable state law. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). Under Oregon law, a fundamental and mutual mistake about a material fact may justify rescission of a settlement agreement. *Kleiner v. Randall*, 58 Or. App. 126, 131 (1982).

As noted, Plaintiff contends the parties were mistaken as to the Tribal Prosecutor's authority to negotiate the DUII charges against Defendant Burke because, according to Plaintiff, the Prosecutor lacks such authority. Although the Affidavit of Plaintiff's counsel reflects the Prosecutor has said as much, the Court notes the parties have not proffered any legal authority to support that contention. Thus, Plaintiff has not established there was any actual mistake about the Prosecutor's legal authority.

If the Prosecutor has such authority, Plaintiff clearly assumed the risk at the time of the settlement that the Prosecutor's exercise of discretion might be adverse to her interest; *i.e.*, that the prosecutor might be unwilling to dismiss the charge against Defendant Burke.

Plaintiff also assumed the risk that the Prosecutor might not have the authority to consider dismissing the charge. As noted, the Court initially alerted the parties off the record that plea bargaining a DUII charge was not permitted under state law and, therefore, might be an issue affecting their conditional

agreement as to the additional \$10,000. Instead of asking for time to contact the Tribal Prosecutor or to investigate the legal basis for the Prosecutor's putative authority to dismiss the charge, Plaintiff and her counsel chose to rely on statements by Burke's personal counsel about that authority and, thus, to go forward and to announce their agreement to settle on the stated terms.

Plaintiff's after-the-fact arguments that Burke's counsel affirmatively misrepresented the Prosecutor's authority fail on their merits. Because the scope of the Prosecutor's actual authority to consider dismissal of the DUII charge under these circumstances has not been established even now, Plaintiff has not shown any misrepresentation, inadvertent or otherwise, by opposing counsel. Indeed, if the Trial Prosecutor dismissed the DUII charge at any point before Burke expends \$10,000 in his defense, there remains the opportunity for Plaintiff to collect additional funds under the Settlement Agreement. Even if Plaintiff could show a misrepresentation by Burke's counsel, however, there is not any evidence in this record to support the conclusion that Plaintiff had the right to rely on opposing counsel regarding such matters in these circumstances. Thus, the Court concludes there is not any basis to deny Defendant Burke's Motion to enforce the Settlement Agreement.

CONCLUSION

For these reasons, the Court **GRANTS** Defendant Burke's Motion to Enforce Settlement Agreement (#33) and directs Plaintiff and her counsel to consummate the Settlement Agreement reached during the settlement conference with this Court on August 25, 2006.

The Court also directs the parties to submit the required stipulated judgment of dismissal to the Court or to submit a joint status report to the Court explaining why they have not done so no later than November 13, 2006. In the event Plaintiff refuses to sign the necessary settlement documents and dismissal judgment, Defendant Burke has leave to file the necessary motions to seek an Order requiring the Clerk of Court to sign the papers in Plaintiff's place.

IT IS SO ORDERED.

DATED this 31st day of October, 2006.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge